STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 1102,	)	
Petitioner,	)	**ULP No. 05-04-477**
v.	)	
CITY OF WILMINGTON,	)	
Respondent.	)	

DECISION ON MOTION TO INTERVENE OF FARRAH A. LAMBERT

The City of Wilmington ("City") is a "public employer" within the meaning of section 1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA" or "Act").

The American Federation of State, County and Municipal Employees, Local 1102 ("AFSCME") is an "employee organization" within the meaning of section 1302(i) of the Act and was the "exclusive bargaining representative" of a bargaining unit of certain employees of the City at all times relevant to this dispute. 19 Del.C. §1302(j)

On April 25, 2005, AFSCME filed an unfair labor practice charge alleging that the City violated §1307(a)(5)[1] of the Act by refusing to arbitrate two (2) grievances filed pursuant to the terms of the collective bargaining agreement. The complaint also alleges that

[1] 19 Del.C. §1307: (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following: (5) Refuse to bargain in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit, except with respect to a discretionary subject.

the City has failed to provide the Union with information the Union requested by letter dated August 15, 2003. The charge alleges the information requested is a matter of public record under 29 Del.C. Chapter 100.

On May 6, 2005, the City filed its Answer, New Matter and Counter Complaint alleging conduct in violation of 19 Del.C. §1307(b)(2).[2] In its Answer the City denies the grievances are arbitrable because the grieved incidents occurred after the expiration of the prior collective bargaining agreement and before the current collective bargaining agreement (which was not finalized until passed and signed by City Council and the Mayor on December 15, 2004).

On or about June 8, 2005, a Probable Cause Determination was issued finding the pleadings establish probable cause to believe that a violation of 19 Del.C. §1307(a)(5) as alleged in the Complaint may have occurred, and that a violation of 19 Del.C. §1307(b)(2) as alleged in the Counter-Complaint may have occurred.

The hearing is scheduled for July 12, 2005.

On July 8, 2005, Farrah A. Lambert moved to be included as an Intervenor in this matter and to appear and participate in the July 12 hearing. Her Motion states:

> 1. Ms. Lambert has a direct interest in the outcome of the July 12, 2005 hearing before PERB, insomuch as she was the employee who was awarded the promotion at issue in the underlying grievances.
>
> 2. The contention of the Petitioner [*AFSMCE*] is, in part, that the outcome of the November 17, 2004 grievance decisions should be subject to arbitration pursuant to the Public Employment Relations Act ("PERA"), specifically §1307(a)(5).

[2] 19 Del.C. §1307: (b) It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following: (2) Refuse to bargain collectively in good faith with a public employer or its designated representative if the employee organization is an exclusive representative.

3. Should the question of arbitration be decided in favor of the Petitioner, Ms. Lambert will be forced to participate in such arbitration, and conceivably be removed from the position she was awarded as a result of the November 17, 2004 decision.

4. Ms. Lambert concurs with the assertion of the City that a binding and enforceable agreement existed between the City, the Petitioner, and the employees who filed the grievances that were determined by the November 17, 2004 decision. Specifically, the agreement was that the decision of the Assistant City Solicitor would be final and binding, so long as one of the grieving parties was ultimately selected for the position in question.

5. Should the outcome of the PERB hearing be otherwise, and the matter required to proceed to arbitration, Ms. Lambert may be adversely affected by that decision, and may conceivably have a separate unfair labor practice to raise against the Petitioner.

6. Accordingly, Ms. Lambert should be afforded a full and fair opportunity to appear as an intervening party to the July 12, 2005 hearing, and to have counsel of her choice to assist her at such hearing.

AFSCME filed its Response to the Motion to Intervene on July 11, 2005, requesting the Motion be dismissed, wherein it stated:

1. The matter before the Public Employment Relations Board ("PERB") is whether the Union has an enforceable right to have an arbitrator determine if the City complied with the provisions of the collective bargaining agreement ("CBA").

2. The Union has the obligation to protect the integrity of the CBA for the protection of all members of the bargaining unit, including Ms. Lambert.

3. The grievance and arbitration provisions are the bargained for dispute resolution procedures between the City and the Union for matters related to the interpretation and application of the CBA.

4. Ms. Lambert's rights, if any, are not superior to the Union's right to have the CBA properly enforced. If the Union is successful, the merits will be heard before a neutral arbitrator.

5. The issue of whether the "right" person was selected for the position, that is, the merits of the selection, is not before the PERB.

6. It is conceivable that when this matter is heard before a neutral arbitrator under the provisions of the CBA, Ms. Lambert will not be found to have been properly awarded the job. The fact that she may lose on the merits does not give her standing to intervene in a dispute over the enforceability of the CBA.

7. Ms. Lambert will have a full and fair opportunity to present the reasons why she should be selected to the position as will the other candidates for the position. The City will also undoubtedly vigorously defend its decision that Ms. Lambert was the most qualified person for the job. Ms. Lambert will not be unrepresented, as the full force and power of the City will be out to prove that she was the right choice.

Respondent City of Wilmington supported the Motion to intervene, stating:

> … [Ms. Lambert] is a substantial party of interest for if the action goes to arbitration and for some reason the Step IV decision is reversed, Ms. Lambert would be demoted.
>
> Furthermore, the City as well as Ms. Lambert legitimately may present defenses against referring this matter to arbitration. The issue is arbitrability. Does Local 1102 have an arbitrable claim. There are defenses to their claim such as the *Litton* doctrine and waiver as a result of the Step IV stipulation. Furthermore there could be other defenses which Ms. Lambert's attorney may raise in her interest.

DISCUSSION

Delaware PERB Rule 1.7, Intervention, provides:

> Any party desiring to intervene shall make a motion for such intervention, stating the grounds upon which such party claims to have an interest in the petition. . .

In order for a party to be granted leave to intervene in a proceeding which was initiated and involves other parties, it must affirmatively establish that it has an interest in the subject matter of the charge which is not adequately represented by the current parties to the

matter. Alternatively, a party may be permitted to conditionally intervene where a showing is made that its claim involves a question of law or fact in common with the proceeding. Walden v. DOT/DTC, ULP 04-12-460, Decision on Motion to Intervene, IV PERB 3267, 3269 (2005)

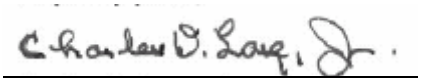
In this case, the City of Wilmington and AFSCME Local 1102 are parties to a collective bargaining agreement. The Charge and Counter-Charge each allege a violation by the opposing party of its duty to bargain in good faith. Individual employees are not parties to the collective bargaining process or agreement, although they may benefit from such processes and agreements. AFSCME is the exclusive bargaining representative of all employees in the bargaining unit for purposes of collective bargaining and has the duty to represent all unit employees without discrimination. Under the exclusivity of representation established by the PERA, the City is obligated not to bargain with any employee or group of employees or other employee organization. 19 Del.C. §1304.

The decision to grant intervener status is discretionary with the adjudicating agency. Walden (Supra, p. 3270). Ms. Lambert's interest is in the resolution of the underlying grievance; the question presented for resolution by the Charge and Counter-Charge concerns the obligations of the parties in processing the grievance, not the substance or outcome of the underlying grievances. While her testimony may be important to the resolution of the underlying grievances, the inclusion of the grievant as a party is not necessary to enable PERB to determine whether the City or AFSCME violated the statute, as alleged, or to enter an appropriate Order should a violation be found.

DECISION

Ms. Lambert's Motion to Intervene is denied.

Dated: 11 July 2005



Charles D. Long, Jr.,
Executive Director